# (16,611.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1897.

No. 398.

OLIVER WENDELL HOLMES, JR., AS ANCILLARY EXECUTOR OF THE WILL OF OLIVER WENDELL HOLMES, DECEASED, APPELLANT,

*vs.*

GEORGE D. HURST.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.


| | Original. | Print. |
|---|---|---|
| Transcript from the circuit court of the United States for the southern district of New York | 1 | 1 |
| Bill of complaint | 1 | 1 |
| Answer | 9 | 9 |
| Agreed statement of facts | 22 | 14 |
| Stipulation as to appointment of executor | 27 | 17 |
| Opinion | 28 | 17 |
| Decree | 30 | 19 |
| Petition for appeal | 31 | 19 |
| Assignment of errors | 32 | 20 |
| Bond on appeal | 33 | 20 |
| Clerk's certificate | 35 | 21 |
| Citation | 36 | 22 |
| Stipulation as to printing record | 37 | 22 |
| Opinion | 38 | 23 |
| Decree | 41 | 25 |
| Assignment of errors | 43 | 26 |
| Bond on appeal | 45 | 27 |
| Petition for appeal | 48 | 28 |
| Order allowing appeal | 50 | 29 |
| Clerk's certificate | 51 | 29 |
| Citation and service | 52 | 30 |


JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 23, 1897.

1 *Bill of Complaint as Amended.*

Filed November 20, 1894.

Circuit Court of the United States for the Eastern District of New York. In Equity.

To the honorable the judges of the circuit court of the United States in and for the eastern district of New York, sitting as a court of equity:

Oliver Wendell Holmes, Jr., of the city of Boston, in the State of Massachusetts, and a citizen of said State of Massachusetts, sole executor of the estate of the late Oliver Wendell Holmes, late of said city of Boston, who, at the time of the taking of all the copyrights hereinafter mentioned and at all times thereafter until his death, was a citizen of the United States, brings this his bill of complaint against George D. Hurst, of the city of Brooklyn, in the State of New York, and an inhabitant of the eastern district of New York, and hereinafter designated the defendant.

And your orator shows unto your honors that his testator, the late Oliver Wendell Holmes, died at said city of Boston on the 7th day of October, 1894, and that by his last will and testament, bearing date June 1st, 1889, your orator, in this bill of complaint
2 referred to as Oliver Wendell Holmes, Jr., was designated as the sole executor of the estate of the testator aforesaid; and your orator shows that the said will has been duly offered for probate, in pursuance to the laws of the State of Massachusetts, and that your orator has, according to law, been duly qualified to act and is now acting as the sole executor, in pursuance of the provisions of said will, and according to law.

And your orator further says that having been in all things qualified as the sole executor of the estate aforesaid, your orator thereafter made application to the surrogate of the county of Kings, in the State of New York, for ancillary letters testamentary upon the estate of said Oliver Wendell Holmes, deceased, in said State of New York, whereupon, on the 13th day of December, 1894, there were granted unto your orator by said surrogate, in due form of law, ancillary letters testamentary upon the goods, chattels and credits, of said Oliver Wendell Holmes, deceased, in said State of New York, as by a duly authenticated copy thereof in court to be produced will more fully appear.

And your orator further says that, in or about the year 1857, his testator aforesaid, Oliver Wendell Holmes, was a citizen of the United States, and the author and inventor of a certain book entitled "The Autocrat of the Breakfast Table." That in the said year, 1857, an agreement was entered into between the said Oliver Wendell Holmes and the publishing house of Phillips, Sampson & Company, who at that time were engaged in business in the city of Boston and State of Massachusetts, and who were then publishers of a certain periodical published each month at said city of Boston, and known as

the "Atlantic Monthly," by which said agreement it was provided that the said book, entitled "The Autocrat of the Breakfast Table," should appear and be printed in said "Atlantic Monthly" in parts or installments, such parts or installments to appear and be printed month after month until the whole book had appeared and been printed.

3 And your — says that, in accordance with the terms of said agreement, the first part or installment of the said book, entitled "The Autocrat of the Breakfast Table," appeared and was printed in the number of the said "Atlantic Monthly" for the month of November, 1857, and the second part or installment in the said "Atlantic Monthly" for the following month, and the other parts or installments the succeeding months, until the whole book had appeared and been printed, the same having appeared and been printed in the numbers of the "Atlantic Monthly" for the months of November and December during the year 1857, and January, February, March, April, May, June, July, August, September and October, 1858, inclusive, a part or installment appearing in each of the said numbers at the time it was issued, all as will more fully appear by copies of the said numbers of the said "Atlantic Monthly" in court to be produced and to which your orator prays leave to refer the same, to all the intents and purposes, as if such numbers, all and singular, had been made a part of this bill of complaint.

And your orator says that, in the case of each and all of the said numbers of the "Atlantic Monthly" in which appeared a part or installment of the said book, the said firm or publishing house of Phillips, Sampson & Company did, before publication, deposit a printed copy of the title of each of such numbers of the "Atlantic Monthly" in the clerk's office of the district court of Massachusetts, being the district in which the author and proprietor of the said book at the time resided, and the clerk of such court, your orator avers, on information and belief, did record the said title in the words of the statute then in the premises obtaining, and said firm or publishing house of Phillips, Sampson & Company did also, within three months from the publication of each of said numbers of said "Atlantic Monthly," cause to be delivered to the said clerk of said district court in each instance a copy of the book, the

4 title of which had been recorded. And your orator, on information and belief, avers that in the case of each and all of the said numbers of the said "Atlantic Monthly" containing a part or installment of said book, the title of such number and a copy of the same were delivered as hereinbefore set forth, the title and a copy being thus deposited and delivered of the numbers of the said "Atlantic Monthly" for the following months, to wit, November and December in the year 1857, and January, February, March, April, May, June, July, August, September and October in the year 1858.

And your orator avers that by reason of the premises aforesaid the said publishing house or firm of Phillips, Sampson & Company acquired the sole right and liberty of printing, reprinting, publishing and vending, in whole and in part, the said numbers of the

"Atlantic Monthly" consisting in part of parts or installments of said "The Autocrat of the Breakfast Table" for the term of twenty-eight years in each instance from the time of recording the title thereof, as hereinbefore set forth.

And your orator further says, on information and belief, that the said publishing house or firm of Phillips, Sampson & Company did give in the case of each of the said numbers of the said "Atlantic Monthly," copyrighted as aforesaid and consisting in part of the said book "The Autocrat of the Breakfast Table," information of copyright being secured by causing to be inserted in the several copies of each and every edition published, on the page following the title page, the following words, to wit, in the case of the numbers issued and copyrighted during the year 1857, "Entered according to act of Congress, in the year 1857, by Phillips, Sampson & Company, in the clerk's office of the district court of the district of Massachusetts," the numbers printed during the year 1858 having a notice in every way the same, except that the year "1858" was substituted for the year "1857."

And your orator further says that the last part or installment of the said book "The Autocrat of the Breakfast Table" having, as aforesaid, appeared and been printed in the number of the "Atlantic Monthly" for October, 1858, without unnecessary delay, to wit, during the month of November, 1858, in accordance with an agreement between the author of said book and said publishing house or firm of Phillips, Sampson & Company, the said author did, before publication of the said book as a complete, continuous and unbroken volume, deposit a printed copy of the title of said book in the clerk's office of the district court of the district of Massachusetts, being the district wherein the said author did reside, and the clerk of the said court did forthwith record the same in a book kept for that purpose, as prescribed by law; and your orator further avers that the said author, said Oliver Wendell Holmes, did, also, within three months from the publication of said book as a complete, continuous and unbroken volume, cause a copy of the same to be to the said clerk delivered; and your orator avers, that by reason of the premises aforesaid, the said Oliver Wendell Holmes acquired, in respect of said book as a complete, continuous and unbroken volume, the sole right and liberty of printing, reprinting, publishing and vending the same for the term of twenty-eight years from the time of recording the title thereof as aforesaid.

And your orator further says that the said Oliver Wendell Holmes did give information of the copyright in said book being secured by causing to be inserted in the several copies of each and every edition published, on the page immediately following the title page, a copyright notice, as follows: "Entered according to act of Congress, 1858, by Oliver Wendell Holmes, in the clerk's office of the district court of the district of Massachusetts," except that in the editions published after June, 1874, at which time was enacted a certain act entitled "An act to amend the law relating to patents, trade-marks and copyrights," the notice of copyright was in the

words as follows, to wit: "Copyright, 1858, by Oliver Wendell Holmes."

6 And your orator further says that the said book, "The Autocrat of the Breakfast Table," was also published by the publishing houses or firms which succeeded the firm of Phillips, Sampson & Company, to wit, the publishing house of William D. Ticknor & Company, of said Boston; Ticknor & Fields, also of said Boston; Fields, Osgood & Company, also of said Boston; James R. Osgood & Co., of said Boston; Houghton, Osgood & Co., of said Boston, and Houghton, Mifflin & Company, of said Boston, and that in all of the copies of every edition published by the said firms or publishing houses, a copyright notice was applied in the words and manner prescribed by the statutes in the premises obtaining at the time the edition was published.

And your orator further says, that in or about the years 1882 and 1891, the said Oliver Wendel- Holmes complied with the statutes concerning copyrights in the premises obtaining, and give notice of his rights, but because the entries and deposits by him made during the said years of 1882 and 1891 are immaterial as affecting any issues sought to be raised by this bill of complaint, the particulars concerning such entries and deposits are not here at length set forth.

And your orator further says that during the year 1886, desiring to have his exclusive right in the premises continued for the term of fourteen years, the said Oliver Wendell Holmes being the author of the said book entitled "The Autocrat of the Breakfast Table," and being the equitable owner of all the privileges secured as aforesaid, did, on the 12th day of July, 1886, within six months before the expiration of the first term and period of enjoyment of the exclusive right of printing, publishing and vending the said book "The Autocrat of the Breakfast Table," record the title of said book a second time, and did comply with all other regulations in regard to original copyrights, that is to say, the said Oliver Wendell

7 Holmes did deposit in the mail, addressed to the Librarian of Congress, at Washington, D. C., a printed copy of the title of said book, and the said librarian did forthwith record the name of such copyright book in a book kept for that purpose, and said Oliver Wendell Holmes did also, within two months from the date of said renewal, cause a copy of the renewal of said copyright to be published for the space of four weeks in a newspaper printed in Boston, Massachusetts, within the United States; and did also give information of the renewed copyright in said book being secured by causing to be inserted in the several copies of each and every edition thereafter published, on the page immediately following the title page, a copyright notice as follows: "Copyright, 1886, by Oliver Wendell Holmes"—with such additional dates from time to time, besides 1886, as should give proper notice of the several copyrights by him secured, namely, the dates 1858, 1882, 1886, 1891—whereby there was secured to the said Oliver Wendell Holmes the sole liberty of printing, reprinting, publishing and vending the said book entitled "The Autocrat of the Breakfast Table," for a period

of fourteen years from the time of the expiration of the first term or period during which the exclusive right to print, publish and vend the said book had been enjoyed. And your orator avers that, by reason of the premises aforesaid, he now has the sole liberty of printing, publishing and vending the said book, copyrighted as aforesaid, within the United States, the said further term of fourteen years, which began to run during the year 1886, not having yet expired.

And your orator further says, on information and belief, that the said defendant, since your orator's rights in the premises were acquired, and since the first day of October, 1894, without the consent and against the will of your orator, in violation of the rights in him vested as aforesaid, has sold, and continues to sell, copies of the aforesaid book entitled "The Autocrat of the Breakfast Table," copyrighted by your orator's testator, as hereinbefore set forth. And your orator says, on information and belief, that the said
8 book thus by the defendant sold, has been by the defendant offered and sold as being a copy and reproduction of the said book as copyrighted by your orator's testator, as hereinbefore set forth. And your orator charges that the sale by the said defendant of the said book entitled "The Autocrat of the Breakfast Table," printed without your orator's consent, constitutes an infringement and violation of the rights acquired by your orator's testator under the statutes of the United States, as hereinbefore set forth.

In consideration whereof, and because your orator cannot have adequate relief except in a court of equity, and to the end that the said George D. Hurst may answer, all and singular, the matters and things hereinbefore set forth and complained of, and that the said George D. Hurst be forthwith restrained by injunction, as well perpetually as during the pendency of this suit, from printing, and from publishing, and from selling, and from exposing for sale, copies of the said piratical and unlawful book, and that your orator may have such further relief in the premises as may seem equitable and as the nature of the case may require.

May it please your honors such relief to grant, and may it please your honors to grant unto your orator a writ of subpœna according to the course of courts of equity, directed to the said George D. Hurst, commanding him personally to be and appear before this honorable court, then and there to answer the premises and to stand to and abide by such order and decree therein as to this honorable court shall, in equity and good conscience, seem to be demanded.

And your orator, as in duty bound, will ever pray, &c.

9 *Answer.*

Filed April 18, 1895.

Circuit Court of the United States, Eastern District of New York.

OLIVER WENDELL HOLMES, JR., as Ancillary Executor of the Will of Oliver Wendell Holmes, Deceased, Complainant,
*against*
GEORGE D. HURST, Defendant.
} In Equity.

The answer of George D. Hurst, the above-named defendant, to the amended bill of complaint exhibited against him by the above-named complainant.

This defendant now and at all times reserving to himself all and all manner of benefits and advantages of exception which may be taken or had to the many errors, uncertainties, imperfections and insufficiencies in the complainant's said amended bill of complaint contained, for answer thereunto or unto so much or such parts thereof as he is advised is material or necessary for him to make answer unto, answering, says:

This defendant admits that the late Oliver Wendell Holmes died in the city of Boston on the 7th day of October, 1894, and that in or about the year 1857 he was a citizen of the United States and the author and inventor of a certain book entitled "The Autocrat of the Breakfast Table."

10 This defendant further answering admits and upon information and belief alleges that in the year 1857, an agreement was entered into between the said Oliver Wendell Holmes, deceased, and the publishing house of Phillips, Sampson & Co., who at that time were engaged in business in the city of Boston, and State of Massachusetts, and who were then publishers of a certain periodical published each month at said city of Boston, and known as the "Atlantic Monthly," by which said agreement it was provided that the said book entitled "The Autocrat of the Breakfast Table" should appear and be printed, and be published by said Phillips, Sampson & Co. in said "Atlantic Monthly" in parts or installments, such parts or installments to appear and be printed and published in the said "Atlantic Monthly" month after month until the whole of said book had appeared and been printed and published in said "Atlantic Monthly."

This defendant further admits and upon information and belief alleges that in accordance with the terms of said agreement, the whole of said book entitled "The Autocrat of the Breakfast Table" appeared and was printed and published by said Phillips, Sampson & Co. in the numbers of the said "Atlantic Monthly" for the months of November and December, 1857, and January, February, March, April, May, June, July, August, September and October, 1858, and

that each of the aforesaid numbers of the "Atlantic Monthly" contained an integral portion of said book.

This defendant, further answering, alleges upon information and belief that the "Atlantic Monthly" for the month of November, 1857, was published by said Phillips, Sampson & Company on or before October 27th, 1857; that the "Atlantic Monthly" for December, 1857, was published by said Phillips, Sampson & Company on or before November 25th, 1857; that the "Atlantic Monthly" for January, 1858, was published by said Phillips, Sampson & Co. on or before December 28th, 1857; that the "Atlantic Monthly"
11 for February, 1858, was published by said Phillips, Sampson & Company on or before January 25, 1858; that the "Atlantic Monthly" for March, 1858, was published by said Phillips, Sampson & Company on or before February 25th, 1858; that the "Atlantic Monthly" for April, 1858, was published by said Phillips, Sampson & Company on or before March 19th, 1858; that the "Atlantic Monthly" for May, 1858, was published by said Phillips, Sampson & Company on or before April 21st, 1858; that the "Atlantic Monthly" for June, 1858, was published by said Phillips, Sampson & Company on or before May 20th, 1858; that the "Atlantic Monthly" for July, 1858, was published by said Phillips, Sampson & Company on or before June 19th, 1858; that the "Atlantic Monthly" for August, 1858, was published by said Phillips, Sampson & Company on or before July 20th, 1858; that the "Atlantic Monthly" for September, 1858, was published by said Phillips, Sampson & Company on or before August 30th, 1858; that the "Atlantic Monthly" for October, 1858, was published by said Phillips, Sampson & Company on or before September 18th, 1858.

This defendant admits that the said firm or publishing house of Phillips, Sampson & Co. did deposit a printed copy of the title of each of the aforesaid numbers of the "Atlantic Monthly" in the clerk's office of the district court of the district of Massachusetts, and upon information and belief this defendant alleges that the date of such deposit of a printed copy of the titles of the numbers of the "Atlantic Monthly" for November and December, 1857, was November 30th, 1857; and that the date of such deposit of a printed copy of the title of the number of the "Atlantic Monthly" for January, 1858, was December 29th, 1857; and that the date of such deposit of a printed copy of the title of the number of the "Atlantic Monthly" for February, 1858, was February 3d, 1858; and that the date of such deposit of a printed copy of the title of the "Atlantic Monthly" for March, 1858, was March 10th, 1858; and that
12 the date of such deposit of a printed copy of the title of the number of the "Atlantic Monthly" for April, 1858, was March 30th, 1858; and that the date of such deposit of a printed copy of the title of the number of the "Atlantic Monthly" for May, 1858, was April 24th, 1858; and that the date of such deposit of a printed copy of the title of the number of the "Atlantic Monthly" for June, 1858, was May 25th, 1858; and that the date of such deposit of a printed copy of the title of the number of the "Atlantic Monthly" for July, 1858, was June 21st, 1858; and that the date of

such deposit of a printed copy of the title of the number of the "Atlantic Monthly" for August, 1858, was July 28th, 1858; and that the date of such deposit of printed copies of the titles of the numbers of the "Atlantic Monthly" for the months of September and October, 1858, was September 25th, 1858.

And upon information and belief this defendant denies that a printed copy of the title of any of the aforesaid numbers of the "Atlantic Monthly" was ever deposited at any time or by any one in the clerk's office of the district court of Massachusetts, except as aforesaid.

This defendant admits that the clerk of said court did record the title of each of the aforesaid numbers of the "Atlantic Monthly" on the aforesaid date when a printed copy of such title was deposited as aforesaid, but denies on information and belief that any of said titles was ever recorded at any other time or was recorded as prescribed by statute.

This defendant, further answering upon information and belief, denies that the publishing house of Phillips, Sampson & Company, or any other person whatever, did, before publication, deposit a printed copy of the title of any of the said numbers of the "Atlantic Monthly," in which appeared a portion of the said book, "The Autocrat of the Breakfast Table," in the clerk's office of the district court of Massachusetts, and denies upon information and
13 belief that the clerk of said court did record any of the said titles as provided by statute.

This defendant has no knowledge or information sufficient to form a belief that a copy of any of the aforesaid numbers of the "Atlantic Monthly," containing a portion of said book, entitled "The Autocrat of the Breakfast Table," was caused to be delivered by Phillips, Sampson & Co., or any other person, to the clerk of the district court of Massachusetts.

This defendant, furthering answering, denies upon information and belief that the publishing house or firm of Phillips, Sampson & Co. ever acquired the sole or other right or liberty of printing, reprinting, publishing or vending in whole or in part any number of the "Atlantic Monthly," consisting in part of a part or installment of the said "The Autocrat of the Breakfast Table" for any term or period whatsoever.

This defendant, further answering, alleges that he has no knowledge or information sufficient to form a belief that the said publishing house of Phillips, Sampson & Co., gave information of copyright being secured, by inserting in the several copies of each and every edition published of each of the said numbers of the said "Atlantic Monthly" any notice of copyright, either as alleged in the bill of complaint herein, or otherwise.

This defendant, further answering, alleges upon information and belief that the last installment of said book "The Autocrat of the Breakfast Table" appeared in the number of the "Atlantic Monthly" for October, 1858, and that said number of the "Atlantic Monthly" was printed, published and sold by Phillips, Sampson & Co. prior to the 19th day of September, 1858, at which time the whole of said

book "The Autocrat of the Breakfast Table" had been entirely completed and had been printed, published and sold by Phillips, Sampson & Co. in said numbers of the "Atlantic Monthly" for the months of November and December, 1857, and January, February, March, April, May, June, July, August, September and October, 1858, and the said book "The Autocrat of the Breakfast Table" has ever since that time been published and publicly offered for sale and sold by Phillips, Sampson & Co. and their successors in the bill of complaint mentioned in the said several numbers of the "Atlantic Monthly."

This defendant further alleges upon information and belief that, during the year 1858 and ever since down to the death of said Oliver Wendell Holmes, said firm of Phillips, Sampson & Co., and their successors in the bill of complaint mentioned, and said Oliver Wendell Holmes, deceased, did publish divers editions of said book entitled "The Autocrat of the Breakfast Table" in a separate form, and that in no copy of any of said editions was information given of any of the copyrights alleged in the bill of complaint to have been secured by Phillips, Sampson & Co.

This defendant, further answering, says he has no knowledge or information sufficient to form a belief that during the month of November, 1858, or at any other time, in accordance with an agreement between the author of said book "The Autocrat of the Breakfast Table" and the said publishing house of Phillips, Sampson & Co., or otherwise, the said author did deposit a printed copy of the title of the said book, "The Autocrat of the Breakfast Table," in the clerk's office of the district court of Massachusetts, or that the clerk of said court recorded the same in the book kept for that purpose, or that the said author did cause a copy of said book to be to the said clerk delivered within three months after the publication thereof, or at any other time.

And this defendant, upon information and belief, denies that the said author did before the publication of said book deposit a printed copy of the title thereof in the office of the clerk of the district court of Massachusetts, or that said clerk did record the same as prescribed by law; and this defendant alleges, on information and belief, that long before the month of November, 1858, and before the alleged deposit by said author of a printed copy of the title of said book in the clerk's office of the district court of Massachusetts said book had been completely printed, published and sold in the aforesaid numbers of the "Atlantic Monthly" by Phillips, Sampson & Co., as aforesaid.

And, upon information and belief, this defendant denies that the said Oliver Wendell Holmes, deceased, ever acquired in respect of said book, either as a complete, continuous, and unbroken volume, or otherwise, any copyright or any sole right or liberty of printing, reprinting, publishing, or vending the same for any term whatever.

This defendant, further answering, says that he has no knowledge or information sufficient to form a belief that any notice of copyright was inserted in the several copies of each and every edition

of said book, "The Autocrat of the Breakfast Table," published by the said Oliver Wendell Holmes, or by the publishing house of Phillips, Sampson & Co., or the publishing house of William D. Ticknor & Co., or the publishing house of Ticknor & Fields, or the publishing house of Field, Osgood & Co., or the publishing house of James R. Osgood & Co., or the publishing house of Osgood, Houghton & Co., or the publishing house of Houghton, Mifflin & Co., after November 1st, 1858, save that a notice in the following words: "Entered according to act of Congress, 1858, by Oliver Wendell Holmes, in the clerk's office of the district court of the district of Massachusetts," was inserted in some of the copies of said book, "The Autocrat of the Breakfast Table," published prior to 1874 by said Oliver Wendell Holmes and by Phillips, Sampson & Co., and their successors in business mentioned in the bill of complaint, and that the words "Copyright, 1858, by Oliver Wendell Holmes," were inserted in some of the copies of said book, "The Autocrat of the Breakfast Table," which were published after 1874 by said Oliver Wendell Holmes and said Phillips, Sampson & Co. and their said successors.

16 This defendant denies upon information and belief that any notice or notices of copyright whatever was or were of any avail to secure to the said Oliver Wendell Holmes or to this complainant any rights or privileges in regard to said book "The Autocrat of the Breakfast Table."

This defendant has no knowledge or information sufficient to form a belief that in any copy of any edition of said book published by Oliver Wendell Holmes, or by Phillips, Sampson & Co., or any of the other publishing houses mentioned in the bill of complaint, a copyright notice was applied or inscribed in the words or manner prescribed by the statutes of the United States in the premises, except that on some of the copies of said numbers of the "Atlantic Monthly" for November and December, 1857, and January, 1858, the following words were inscribed: "Entered according to act of Congress in the year 1857 by Phillips, Sampson & Co. in the clerk's office of the district court of the district of Massachusetts," and also except that on some of the copies of said numbers of the "Atlantic Monthly" for February, March, April, May, June, July, August, September and October, 1858, the following words were inscribed: "Entered according to act of Congress in the year 1858 by Phillips, Sampson & Co. in the clerk's office of the district court of the district of Massachusetts."

This defendant, further answering, says that he has no knowledge or information sufficient to form a belief that in the years 1882 or 1891 the said Oliver Wendell Holmes complied with certain statutes concerning copyrights or gave notice of his alleged rights as alleged in the bill of complaint, which allegations are in the bill stated to be immaterial as affecting any issue sought to be raised by the bill of complaint, and the defendant neither admits nor denies the same, and prays that the complainant be not permitted to give any evidence whatever concerning the said immaterial matters.

This defendant, further answering, denies upon information and

belief that the said Oliver Wendell Holmes had any exclusive right in relation to said book "The Autocrat of the Breakfast
17 Table" in the year 1886, or at any other time, after the publication thereof in the "Atlantic Monthly," as aforesaid, or that said Oliver Wendell Holmes was, in 1886, or at any other time, the equitable owner of all or any of the privileges in said bill of complaint alleged to have been secured by the copyright laws of the United States.

Upon information and belief this defendant further denies that the said publishing house of Phillips, Sampson & Co., or the said Oliver Wendell Holmes, or any person whatsoever, ever had the exclusive right of printing, publishing or vending the said book "The Autocrat of the Breakfast Table" after the publication thereof in the "Atlantic Monthly," as aforesaid.

This defendant has no knowledge or information sufficient to form a belief that the said Oliver Wendell Holmes did record the title of the said book "The Autocrat of the Breakfast Table" a second time, or comply with any regulation in regard to original copyright, or deposit in the mail, addressed to the Librarian of Congress, at Washington, D. C., a printed copy of the title of the said book, or that said librarian did record the name of said book, or that said Oliver Wendell Holmes did, within two months from the date of said alleged renewal, or at any other time, cause a copy of the alleged renewal of said alleged copyright to be published for the space of four weeks, or otherwise, in a newspaper printed in Boston, Massachusetts, or any other newspaper.

The defendant has no knowledge or information sufficient to form a belief that the said Oliver Wendell Holmes gave information of the alleged renewal of said alleged copyright in the said book, as set forth in the bill of complaint, or otherwise.

This defendant also denies, upon information and belief, that there was ever secured to the said Oliver Wendell Holmes, or that he ever acquired the sole or any liberty of printing, reprinting, publishing or vending the said book entitled "The Autocrat of the
18 Breakfast Table" for any period of time whatsoever, or that he or any other person or persons ever enjoyed the exclusive right to print, publish or vend the said book.

This defendant further denies, upon information and belief, that the complainant herein now has or ever had the sole liberty of printing, publishing or vending the said book, "The Autocrat of the Breakfast Table."

This defendant, further answering, denies that he has ever sold or disposed of a copy of the book entitled "The Autocrat of the Breakfast Table," or any part thereof, except that this defendant admits and alleges that since the first day of November, 1894, this defendant has sold and disposed of a limited number of copies of the book entitled "The Autocrat of the Breakfast Table," which appeared and was printed and published in the said numbers of the "Atlantic Monthly" for November and December, 1857, and January, February, March, April, May, June, July, August, September and October, 1858, as aforesaid.

This defendant alleges that all of said copies so sold and disposed of by this defendant were exact copies, word for word, of said book "The Autocrat of the Breakfast Table" as it appeared and was printed and published in the aforesaid numbers of the "Atlantic Monthly," and that none of said copies contained any other or additional matter whatsoever.

This defendant alleges that upon each and every copy of said book so sold or disposed of by this defendant a notice appeared upon the title page showing the source from which the said book was taken and in no one of said copies so sold or disposed of by this defendant was anything printed or inserted to indicate that the same was taken from the book alleged to have been copyrighted by Oliver Wendell Holmes, the testator of the complainant herein, and denies that he has at any time, in violation of any right of the said Oliver Wendell Holmes, or of the complainant in this suit, sold or otherwise disposed of any copy of the book entitled "The Autocrat of the Breakfast Table."

The defendant further denies that any book sold or other-
19 wise disposed of by this defendant has been by him offered or sold as being a copy or reproduction of any book copyrighted by the complainant's testator.

This defendant further denies that the sale or disposal of any copies of any book sold or disposed of by the defendant constitutes an infringement or violation of any right acquired by the complainant's testator under the statutes of the United States, or otherwise

And this defendant, further answering, alleges upon information and belief that the said book, "The Autocrat of the Breakfast Table," was published by said publishing house of Phillips, Sampson & Co., in the magazine known as the "Atlantic Monthly" in installments, as hereinabove set forth, and that no exclusive right whatever in or to any number of said "Atlantic Monthly," containing any installment of said book "The Autocrat of the Breakfast Table," was at any time secured by any person under the copyright laws of the United States.

This defendant further alleges upon information and belief that prior to the 26th day of September, 1886, more than twenty-eight years had elapsed after the recording of the titles of the said numbers of the "Atlantic Monthly," containing said book "The Autocrat of the Breakfast Table" in the office of the clerk of the district court for the district of Massachusetts, and that the title of none of said numbers of the "Atlantic Monthly" was ever recorded a second time, and that none of the requirements of section 4954 of the Revised Statutes of the United States were ever complied with in respect of any of said numbers of the "Atlantic Monthly."

This defendant denies upon information and belief that Phillips, Sampson & Co., or complainant's testator, or any person whatever, obtained any rights or privileges in regard to said book "The Autocrat of the Breakfast Table," so printed, published and sold in said numbers of the "Atlantic Monthly" or in any other form

whatever, by which the publication of the same by others could be interfered with under the statutes of the United States.

This defendant, further answering, alleges upon information and belief that the alleged entry for copyright of the title of "The Autocrat of the Breakfast Table" stated in the bill of complaint to have been made by Oliver Wendell Holmes, the complainant's testator, in the month of November, 1858, was, and is, without authority or warrant of law whatever, and afforded no rights or privileges of any kind or nature in regard to said book, either to or upon the testator of complainant, or to or upon any person or persons whatsoever, for the reason that said alleged entry was made long after the said book "The Autocrat of the Breakfast Table" had been printed, published and sold in the "Atlantic Monthly" as aforesaid.

This defendant, further answering, as he is advised and believes, alleges that none of the acts in said bill stated to have been performed by complainant's testator in the year 1886, or thereafter, were authorized by any laws of the United States, or avail the testator of the complainant to prolong the alleged exclusive right of printing, publishing or vending or otherwise disposing of the book "The Autocrat of the Breakfast Table" as theretofore printed, published and sold in the said "Atlantic Monthly," as hereinabove set out.

This defendant, further answering, denies that he has printed, published, sold or exposed for sale any piratical or unlawful copy whatever of "The Autocrat of the Breakfast Table," the book mentioned and referred to in the bill of complaint.

This defendant further denies that he has ever infringed upon any legal rights of the complainant or of his testator, or has ever done any act to reduce any lawful profits of the complainant or his testator, or to cause him or his testator any loss, or done anything calculated to injure the complainant or his testator, or imperil his or his testator's business, or destroy any right whatever belonging to the complainant or his testator, or to deprive him or his
21 testator of any gains or profits to which he or his testator may be legally entitled.

This defendant, further answering, denies that the said complainant is entitled to the relief, or any part thereof, in his said bill of complaint demanded.

This defendant prays the same advantage of his aforesaid answer as if he had pleaded or demurred to the said bill of complaint without this, that any matter or thing therein contained and not herein specifically admitted or denied, is true to the knowledge of this defendant.

All of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct, and he prays hence to be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

GEORGE D. HURST.

ANDREW GILHOOLY,
*Solicitor and of Counsel for Defendant.*

CITY AND COUNTY OF NEW YORK, *ss:*

George D. Hurst, being duly sworn, says that he is the defendant in the above-entitled suit, and that the foregoing answer is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes the same to be true.

GEORGE D. HURST.

Sworn to before me this 12th day of February, 1895.

WILLIAM K. GILCHRIST,
*Notary Public, N. Y. Co.*

22 United States Circuit Court, Eastern District of New York.

OLIVER WENDELL HOLMES, JR., as Ancillary Executor, &c., of Oliver Wendell Holmes, Deceased, Complainant,
*against*
GEORGE D. HURST, Defendant.
} Stipulation.

For the purpose of saving time and expense to the parties, and in order to hasten the hearing of this cause, it is hereby stipulated and agreed between the solicitors for the respective parties herein that the following agreed statement of facts is true in every particular and may be made a part of the record herein and used at the hearing with the same force and effect as though the facts therein stated had been duly proved by competent testimony according to the rules of the said court.

*Agreed Statement of Facts.*

1. Oliver Wendell Holmes, deceased, was the author of the book entitled "The Autocrat of the Breakfast Table." During the years 1857 and 1858, and for many years subsequent thereto, the firm of Phillips, Sampson and Company were engaged in business as publishers in the city of Boston and State of Massachusetts, and were the proprietors and publishers of a certain periodical magazine, published each month at said city of Boston, and entitled and known as "The Atlantic Monthly," and having a large circulation.

23 2. A part of said book, entitled "The Autocrat of the Breakfast Table," was published in print in the number of said "Atlantic Monthly" for November, 1857, and a further part of said book was published in print in the number of said "Atlantic Monthly" for December, 1857, and a further part of said book was published in print in the number of said "Atlantic Monthly" for January, 1858, and a further part of said book was published in print in the number of said "Atlantic Monthly" for February, 1858, and a further part of said book was published in print in the number of said "Atlantic Monthly" for March, 1858, and a further part of said book was published in print in the number of said "Atlantic Monthly" for April, 1858, and a further part of said book was pub-

lished in print in the number of said "Atlantic Monthly" for May, 1858, and a further part of said book was published in print in the number of said "Atlantic Monthly" for June, 1858, and a further part of said book was published in print in the number of said "Atlantic Monthly" for July, 1858, and a further part of said book was published in print in the number of said "Atlantic Monthly" for August, 1858, and a further part of said book was published in print in the number of said "Atlantic Monthly" for September, 1858, and a further part of said book was published in print in the number of said "Atlantic Monthly" for October, 1858. Said twelve parts of said book entitled "The Autocrat of the Breakfast Table," so published as aforesaid in said twelve numbers of the "Atlantic Monthly," constituted the whole of said book, and were all published as aforesaid by said firm of Phillips, Sampson & Co., at the said city of Boston, prior to the 19th day of September, 1858.

3. Each of said twelve numbers of the "Atlantic Monthly" was a bound volume of 128 printed pages, and consisted of the part of said book entitled "The Autocrat of the Breakfast Table," therein published as aforesaid, and other literary compositions. Prior to
24 the 19th day of September, 1858, said firm of Phillips, Sampson & Co. did, at said city of Boston, publish in print all of said twelve numbers of the "Atlantic Monthly," and sell to the public thousands of printed copies of each of said twelve numbers.

4. That said twelve parts of said book entitled "The Autocrat of the Breakfast Table" (the same constituting the whole of said book) were printed, published and sold as aforesaid by said firm of Phillips, Sampson & Company in said twelve numbers of the "Atlantic Monthly" as aforesaid under and in accordance with the terms of an agreement made by and between said Oliver Wendell Holmes and said firm of Phillips, Sampson and Company, whereby for a valuable consideration to said Oliver Wendell Holmes, paid by said firm of Phillips, Sampson and Company, said Oliver Wendell Holmes granted to said firm of Phillips, Sampson and Company the right to print, publish and sell each of said twelve parts of said book, entitled "The Autocrat of the Breakfast Table," in the particular number of the "Atlantic Monthly," in which the same was published as aforesaid; and in and by said agreement it was further agreed by said Phillips, Sampson and Company that they should have no other right in or to said book.

Each of said twelve parts of said book, entitled "The Autocrat of the Breakfast Table," was written by said Oliver Wendell Holmes with a view to the publication thereof in the particular number of the "Atlantic Monthly," in which the same was published as aforesaid and was completed just prior to the publication of such number. Pursuant to said agreement between Oliver Wendell Holmes and Phillips, Sampson and Company the manuscript of each of said twelve parts of said book was delivered by said Oliver Wendell Holmes to Phillips, Sampson and Company for publication by Phillips, Sampson and Company in the particular number
25 of the "Atlantic Monthly," in which the same was published as aforesaid and just prior to the publication of such number.

5. No copyright was secured by said Oliver Wendell Holmes or said firm of Phillips, Sampson and Company or any other person in any of said twelve numbers of the "Atlantic Monthly" containing said book, "The Autocrat of the Breakfast Table," or in any part of any of said numbers.

6. In accordance with another agreement entered into in October, 1858, between said author, Oliver Wendell Holmes, and said firm of Phillips, Sampson and Company, the said firm published "The Autocrat of the Breakfast Table" in a separate and continuous volume on the 22d day of November, 1858.

On November 2d, 1858, said Oliver Wendell Holmes did deposit a printed copy of the title of said book in the clerk's office of the district court of the district of Massachusetts, being the district wherein said author resided, and the clerk of said court forthwith recorded the same in a book kept for that purpose; and the said author did also, on the 22d day of November, 1858, cause a copy of said book to be to the said clerk delivered.

7. A notice, viz., "Entered according to act of Congress, 1858, by Oliver Wendell Holmes in the clerk's office of the district court of the district of Massachusetts," has appeared in every copy of said book of every edition published in the form of a separate and continuous volume, except that in the editions published after June, 1874, the notice has been as follows: "Copyright, 1858, by Oliver Wendell Holmes."

8. On July 12, 1886, said Oliver Wendell Holmes recorded the title of "The Autocrat of the Breakfast Table" a second time and deposited in the mail addressed to the Librarian of Congress at Washington, D. C., a printed copy of the title of said book,
26 and the said librarian did forthwith record the title of said book in a book kept for that purpose; and said Oliver Wendell Holmes did, also cause a copy of the record last aforesaid to be published in the "Boston Weekly Advertiser," a newspaper published in Boston, Massachusetts, within the United States, in the issues of said paper for August 27th, and September 3d, 10th and 17th, 1886; and said Oliver Wendell Holmes caused to be inserted in the several copies of each and every edition thereafter published in the form of a separate and continuous volume on the page immediately following the title page, a notice as follows: "Copyright, 1886, by Oliver Wendell Holmes."

9. The defendant has not sold or disposed of a copy of the book entitled "The Autocrat of the Breakfast Table" or any part thereof, except that since the first day of November, 1894, the defendant has sold and disposed of a limited number of copies of the book entitled "The Autocrat of the Breakfast Table," all of which copies were copied by the defendant from said twelve numbers of the "Atlantic Monthly" and were exact copies, word for word, of said twelve parts of "The Autocrat of the Breakfast Table" which were printed and published in the aforesaid numbers of the "Atlantic Monthly," and none of said copies contained any other or additional matter whatsoever, except that the copies were consecutively paged so as to form a continuous volume. Upon each and every copy of said book so

sold or disposed of by the defendant, a notice appeared on the title page stating that the same was taken from the said twelve numbers of the "Atlantic Monthly."

10. No testimony shall be taken by either party herein.

Dated New York, April 11, 1896.

ROWLAND COX,
*Complainant's Solicitor.*
ANDREW GILHOOLEY,
*Defendant's Solicitor.*

27 United States Circuit Court, Eastern District of New York.

OLIVER WENDELL HOLMES, JR., as Executor, &c.,
*vs.*
GEORGE D. HURST.

*Stipulation.*

It is hereby admitted by the solicitor for the defendant in the above-entitled cause that the late Oliver Wendell Holmes died in the city of Boston, Massachusetts, on the 7th day of October, 1894, and that by his last will and testament, bearing date June 1, 1889, the complainant, Oliver Wendell Holmes, Jr., was designated as the sole executor of said will; that said will has been duly probated in pursuance of the laws of the State of Massachusetts, and that the said Oliver Wendell Holmes, Jr., has, according to the laws of the State of Massachusetts, been duly qualified to act as the sole executor of said will; and also that Oliver Wendell Holmes, Jr., heretofore made application to the surrogate of the county of Kings, in the State of New York, for ancillary letters testamentary upon the estate of said Oliver Wendell Holmes, deceased, in the State of New York, whereupon, on the 13th day of December, 1894, there were granted unto said Oliver Wendell Holmes, Jr., by said surrogate, in due form of law, ancillary letters testamentary upon the goods, chattels and credits of said Oliver Wendell Holmes, deceased, in said State of New York.

Dated New York, April 24, 1896.

ANDREW GILHOOLY,
*Solicitor for Defendant.*

(Endorsed:) Stipulation. Filed May 5, 1896.

28 United States Circuit Court, Eastern District of New York.

OLIVER WENDELL HOLMES
*vs.*
GEORGE D. HURST. } In Equity.

This suit is brought by the plaintiff as executor of Oliver Wendell Holmes upon an alleged copyright by the testator as author of "The Autocrat of the Breakfast Table," the validity of which is denied because of prior publication. As the work was written, parts of it which would make the whole were printed and circulated suc-

cessively as a part of the Atlantic Monthly, published by Phillips, Samson & Co., in Boston, under contract with the testator, by which they were to have that and no other right to it. The proceedings for this copyright were begun afterwards. The counsel for the plaintiff insists that this serial publication of parts as written was not an abandonment of, and would not cut off, what was left to him by his contract with those publishers, which would be the right to copyright the whole work. The common-law right of the author to control giving out his work would cover this contract for serial publication; and, if his statutory right would still be left, that argument would seem to be sound. The statutory copyright seems to be divisible as the holder pleases (Press Publishing Co. *vs.* Monroe, 73 Fed. Rep., 196). And if the right to copyright is also divisible, without having the exercise of the right to a part destroy the right to the remainder, the argument would further appear to be sound. But if the exercise of the common-
29 law right amounts to a publication it will, under the law, cut off the statutory right unless the necessary steps are taken to keep it. And also if the right to the statutory privilege of obtaining a copyright is so exercised as to amount to a publication, the remainder of the right will be destroyed unless the required steps are taken to preserve that. That what was done with each part amounts to a publication of that part in the Atlantic Monthly is not, and could not well be, questioned. Each, when so published, was gone into the free literature of the world, and could not be taken back into control, and all when so published would be so gone. Any one could freely use each part after it had so come out, and could so freely use all parts separately or together after all had so come out. An inventor may keep his right to a patent so long as his invention is kept out of public use, and from on sale and for two years more, but not longer; but no time after publication is left for a copyright to an author. And there is no qualification in the statute as to the kind of publication, whether in whole at a time or by piecemeal; what is published anyhow is gone out of the author's reach. Such appears to have been the opinion of Judge Jenkins in Holmes *vs.* Donahue, no. dist. Ill., heard after this case was submitted.

Bill dismissed.

HOYT H. WHEELER.

Rowland Cox, for complainant.
Andrew Gilhooly, for defendant.

(Endorsed:) Opinion. Filed November 6, 1896.

30 At a stated term of the circuit court of the United States for the eastern district of New York, held at the court-rooms of said court, in the post-office building, in the city of Brooklyn, in said district, on the 10th day of November, 1896.

Present: The Hon. Hoyt H. Wheeler, district judge, holding the court.

OLIVER WENDELL HOLMES, JR., as Ancillary Executor of the Will of Oliver Wendell Holmes, Deceased, Complainant,
*against*
GEORGE D. HURST, Defendant.

This cause having come on for final hearing upon the pleadings, the stipulation of agreed statement of facts, dated April 11, 1896, subscribed by the solicitors for the respective parties, and the stipulation, dated April 24, 1896, subscribed by the solicitor for the defendant:

Now, after hearing Rowland Cox, Esq., of counsel for the complainant, and Andrew Gilhooly, Esq., of counsel for the defendant, it is—

Ordered, adjudged and decreed, that the complainant's bill of complaint herein be and the same hereby is dismissed, with costs to the defendant, to be taxed by the clerk of this court.

(Signed) HOYT H. WHEELER.

(Endorsed:) Decree. Filed and entered November 11, 1896.

31 United States Circuit Court, Eastern District of New York.

OLIVER WENDELL HOLMES, JR., Executor, Complainant,
*vs.*
GEORGE D. HURST, Defendant.
In Equity.

*Petition for Appeal.*

The above-named complainant, conceiving himself aggrieved by the final decree filed and entered in the office of the clerk of this court, on the 11th day of November, 1896, in the above-entitled cause, dismissing the bill of complaint herein with costs, does hereby appeal therefrom to the United States circuit court of appeals for the second circuit, and he prays that his appeal may be allowed and a citation granted directed to the above-named defendant, commanding him to appear before the United States circuit court of appeals for the second circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and evidence in said case, duly authenticated, may be sent to the said United States circuit court of appeals for the second circuit.

Dated November 12, 1896.

ROWLAND COX,
*Solicitor for Complainant.*

Complainant having filed the necessary security for costs, it is—

32 Ordered, that the foregoing appeal be and the same is hereby allowed.

Dated New York, N. Y., Novemner 12, 1896.

(Signed) E. HENRY LACOMBE,
*U. S. Circuit Judge.*

(Endorsed :) Petition for appeal and allowance. Filed November 13, 1896.

United States Circuit Court, Eastern District of New York.

OLIVER WENDELL HOLMES, JR., Executor, Complainant,
*vs.*
GEORGE D. HURST, Defendant.
} In Equity.

*Assignment of Errors.*

And now comes the complainant and says that in the record and proceedings of the said court in the above-entitled cause and in the final decree made and entered therein on the 11th day of November, 1896, there is manifest error, and for error the said complainant assigns the following:

1. The court erred in holding that the printing in serial form in the Atlantic Monthly before the copyright had been obtained of the book entitled "The Autocrat of the Breakfast Table," was a publication which rendered the copyright invalid.

33 2. The court erred in not holding that, under the circumstances of this case, a valid copyright was obtained upon the book in question, although the same was printed and published in serial form in parts, as it was written before the copyright had been obtained.

3. The court erred in not granting the complainant a decree for the relief prayed for in the bill.

4. The court erred in dismissing the bill of complaint.

ROWLAND COX,
*Sol'r for Complainant.*

(Endorsed :) Assignment of errors. Filed November 13, 1896.

Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.

OLIVER WENDELL HOLMES, JR., Executor, Complainant,
*vs.*
GEORGE D. HURST, Defendant.
} Bond for Damages and Costs.

Know all men by these presents that I, Albert F. Houghton, of No. 97 Lexington avenue, in the city of New York, in the county and State of New York, a householder in said city of New

34 York, *is* held and firmly bound unto the above-named George D. Hurst in the sum of five hundred dollars, to be paid to the said George D. Hurst; for the payment of which, well and truly to be made, I bind myself, my heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with my seal and dated the 12th day of November, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas the above-named Oliver Wendell Holmes, Jr., executor,

has prosecuted an appeal to the United States circuit court of appeals for the second circuit to reverse the final decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the eastern district of New York:

Now therefore the condition of this obligation is such that if the above-named Oliver Wendell Holmes, Jr., complainant, shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ALBERT F. HOUGHTON. [SEAL.]

Sealed and delivered and taken and acknowledged this 12th day of November, 1896, before me—

HERMAN GUSTOW,
*Notary Public, New York County.*

UNITED STATES OF AMERICA,
*Southern District of New York, State of New York, City and County of New York,* } *ss:*

Albert F. Houghton, being duly sworn, deposes and says that he is a resident and householder in the city of New York, and
35 that he is worth the sum of one thousand dollars *and* over and above all his just debts and liabilities.

ALBERT F. HOUGHTON.

Subscribed and sworn to this 12th day of November, A. D. 1896, before me—

HERMAN GUSTOW,
[SEAL.] *Notary Public, New York County.*

Approved as to sufficiency of surety November 12, 1896.

ANDREW GILHOOLY,
*Def't's Solicitor.*

E. HENRY LACOMBE,
*U. S. Circuit Judge.*

(Endorsed:) Bond for damages and costs on appeal. Filed and recorded November 13, 1896.

UNITED STATES OF AMERICA,
*Eastern District of New York,* } *ss:*

I, B. Lincoln Benedict, clerk of the United States circuit court for the eastern district of New York, do hereby certify that the foregoing is a true copy of the pleadings, stipulations, opinion, decree and papers on appeal, made up to be transmitted to the United States circuit court of appeals for the second circuit, in the case of Oliver Wendell Holmes, Jr., executor, *vs.* George D. Hurst.

In witness whereof, I have hereunto set my hand and seal of this court this 16th day of November, 1896.

[SEAL.] B. LINCOLN BENEDICT, *Clerk.*

36 By the Honorable E. Henry Lacombe, judge of the circuit court of the United States for the eastern district of New York, in the second circuit.

To George D. Hurst:

Whereas, Oliver Wendell Holmes, Jr., executor, has lately appealed to the United States circuit court of appeals for the second circuit from a final decree lately rendered in the United States circuit court for the eastern district of New York, made in favor of you, the said George D. Hurst, and has filed the security required by law, you are, therefore, cited to appear before the said United States circuit court of appeals for the second circuit, to be held at the city of New York, in the State of New York, on the 12th day of December, 1896, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the 12th day of November, in the year of our Lord one thousand eight hundred and ninety-six.

E. H. LACOMBE,
*U. S. Circuit Judge.*

Due service of a copy of the foregoing citation admitted November 13, 1896.

ANDREW GILHOOLY,
*Sol'r for Defendant.*

(Endorsed:) United States circuit court, eastern district of New York. Oliver Wendell Holmes, Jr., executor, *vs.* George D. Hurst. Citation. Rowland Cox, sol'r for compl't, 229 Broadway, New York, N. Y. Received November 13, 1896.

37 U. S. Circuit Court of Appeals for the Second Circuit.

OLIVER WENDELL HOLMES, JR., Executor, Appellant,
*vs.*
GEORGE D. HURST, Appellee.

It is hereby stipulated and agreed that the subpœna, marshal's return of service of same, appearance and replication forming part of the transcript of record herein may be omitted in the printed record on appeal.

Dated New York, November 18, 1896.

ANDREW GILHOOLY,
*Counsel for Appellee.*
ROWLAND COX,
*Counsel for Appellant.*

(Endorsed:) U. S. circuit court of appeals, second circuit. Oliver Wendell Homes, Jr., executor, appellant and compl't, *vs.* Geo. D. Hurst, appellee and defendant. Stipulation dispensing with printing of parts of record.

38 United States Circuit Court of Appeals for the Second Circuit, October Term, 1896.

Submitted April 20, 1897. Decided May 3, 1897.

OLIVER WENDELL HOLMES, JR., as Ancillary Executor of Oliver Wendell Holmes, Deceased, Complainant, Appellant,
*vs.*
GEORGE D. HURST, Defendant, Appellee. } No. 107.

Appeal from the circuit court of the United States for the southern district of New York.

Before Judges Wallace, Lacombe, and Shipman.

This is an appeal from the circuit court, southern district of New York, dismissing complainant's bill. The suit is brought to restrain publication of the well-known book, written by Oliver Wendell Holmes and entitled "The Autocrat of the Breakfast Table." On November 2, 1858, the title of the book was deposited in pursuance of the statutes of the United States relating to copyrights; on November 22, 1858, a copy of the book was delivered to the clerk of the district court as therein provided, and the other statutory requirements were duly complied with. Thereafter the statutory provisions concerning renewals were complied with, whereby the copyright was extended for a period of fourteen years from July 12, 1886. Complainant as ancillary executor holds the legal title to the copyright. The defendant contends that the author never became entitled to the benefit of the copyright act in force in 1858 (the act of 1831) for the reason that he did not before publication de-
39 posit a printed copy of the title as required by the fourth section of the act, which reads "Sec. 4. And be it further enacted: That no person shall be entitled to the benefit of this act unless he shall before publication deposit a printed copy of the title of such book, &c., &c."

The evidence shows that the book was printed or published in parts or fragments, as it was written (such publication being without copyright) in the Atlantic Monthly, beginning with the number of the magazine for November 1857, and continuing from month to month until the number for October 1858, in which number the last part or fragment of the book appeared, a full month before deposit of the title. Each of these parts, as it appeared, was entitled "The Autocrat of the Breakfast Table;" and none of the numbers of the Atlantic Monthly were copyrighted. The judge who heard the cause at circuit reached the conclusion that this was a publication, and the same opinion was expressed in the U. S. circuit court for the northern district of Illinois in a suit against another alleged infringer. Holmes *v.* Donohue, (77 Fed. Rep. 179).

*Per Curiam:* It seems unnecessary to add anything to the opinion of the circuit court and the one cited above from 77 Fed. Rep. The

complainant's brief has much to say as to the author's having no "intention to abandon." Of course there are cases where knowledge of a person's intent is materially helpful towards the determination of what his actions really were; the statue or picture exhibited to friends in the artist's studio, the MS. submitted to critics for suggestions as to alteration, the books distributed for purposes of future sale are cases in point. But where an author causes what he has written to be printed and then allows it to be put publicly on sale, offering copies to whomever chooses to buy, and actually selling such copies by the thousand, it is idle to say that there had been no publication of what is thus printed and given to the world, because the author intended thereafter to combine what he has thus sold with other writings of his own and then to apply for copyright on the combination.

40 The statute it will be observed says nothing about "abandonment" or "intention to abandon;" copyright is refused where the printed copy of the title has not been filed "before publication." As to so much of the book as has been published before filing title the author cannot, under this statute, obtain copyright. If he has published part of the book only, he may no doubt copyright the remainder, but where he has actually published and sold in separate parts every chapter and sentence from the first word to the last, it is difficult to conceive how in the face of this statute, he could nevertheless obtain a copyright for the book as a whole. He might have copyrighted each part monthly as it appeared. Suppose he had done so and then sold each copyright to some one else. What rights would each purchaser have? clearly to enjoin any one, even the author, from offering for sale copies of the particular part covered by the particular copyright the purchaser owned. But would it be contended for a moment that, although the author could not lawfully sell copies of any single part thus copyrighted (and the copyright transferred for value to another), he might nevertheless sell copies of all the parts, if printed and bound together in a single book, justifying his infringement of any one copyright by the fact that he at the same time infringed eleven others. The proposition contended for that the whole book is something other or different from the aggregation of all its parts is a refinement of which we do not think the statute is susceptible.

The decree of the circuit court is affirmed with costs.

Rowland Cox, for the appellant.
Andrew Gillhooly, for the appellee.

41 At a term of the United States circuit court of appeals for the 2nd circuit, held at its court-room, in the United States court and post-office building in the city of New York, on the — day of May, 1897.

Present: Hon. Wm. J. Wallace, Hon. Emile H. Lacombe, Hon. Nathaniel Shipman, judges.

OLIVER WENDELL HOLMES, JR., as Ancillary Executor of the Will of Oliver Wendell Holmes, Deceased, Complainant and Appellant,
*against*
GEORGE D. HURST, Defendant and Appellee.
} In Equity.

This cause coming on to be heard on the 20th day of April, 1897, on an appeal by Oliver Wendell Holmes, Jr., as ancillary executor of the will of Oliver Wendell Holmes, deceased, complainant and appellant, from the final decree of the circuit court of the United States for the eastern district of New York, dated November 10th, 1896, and filed and entered November 11th, 1896, in the office of the clerk of said court, and argument thereon having been had, Rowland Cox, Esq., of counsel for complainant, appellant, being heard in support of said appeal, and Andrew Gilhooly, Esq., of counsel for defendant, appellee, having been heard in opposition thereto, and due consideration having been had:

Now, therefore, on motion of Andrew Gilhooly, Esq., of counsel for defendant, appellee—

42 It is ordered, adjudged, and decreed that said final decree of the said United States circuit court for the eastern district of New York be, and the same hereby is, affirmed in all respects with costs to said defendant, appellee, to be taxed against said Oliver Wendell Holmes, Jr., as ancillary executor as aforesaid, the complainant, appellant, and that the clerk of this court be, and he hereby is, directed to issue to the said circuit court the mandate of this court remanding said cause to that court with directions that such further proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, said appeal notwithstanding.

(Signed) W. J. W.

Endorsed: U. S. circuit court of appeals. Oliver Wendell Holmes, Jr., as ancillary executor of the will of Oliver Wendell Holmes, deceased, complainant and appellant, against George D. Hurst, defendant and appellee. Order of affirmance and for mandate. Andrew Gilhooly, solicitor and counsel for appellee, 5 Beekman street, New York city. The within-proposed order is approved as to form, and notice of motion is waived. Dated N. Y., May 5th, 1897. Rowland Cox. United States circuit court of appeals, second circuit. Filed May 6, 1897. James C. Reed, clerk.

43 United States Circuit Court of Appeals for the Second Circuit.

OLIVER WENDELL HOLMES, JR., as Ancillary Executor of the Will of Oliver Wendell Holmes, Deceased, Complainant and Appellant,

*vs.*

GEORGE D. HURST, Defendant and Appellee.

*Assignment of Errors.*

And now comes the complainant and appellant and says that in the record and proceedings of the said court in the above-entitled cause and in the decision, order, and decree made and entitled therein on the 6th day of May, 1897, there is manifest error, and for error the said complainant and appellant assigns the following:

1. The court erred in holding that the printing, in serial form, in the Atlantic Monthly, before the copyright had been obtained, of the book entitled "The Autocrat of the Breakfast Table" was a publication which rendered the copyright invalid.

2. The court erred in not holding that, under the circumstances of this case, a valid copyright was obtained upon the book in question, although the same was printed and published in serial form in parts as it was written before the copyright had been obtained.

44 3. The court erred in not granting an order and decree for mandate directing the circuit court of the United States for the eastern district of New York to vacate the final decree entered therein on the 11th day of November, 1896, and directing that decree be entered therein granting the complainant the relief prayed for in the bill.

4. The court erred in entering an order and decree for mandate affirming the final decree of the circuit court of the United States for the eastern district of New York, entered therein on the 11th day of November, 1896.

ROWLAND COX,
*Solicitor and Counsel for Complainant and Appellant.*

Endorsed: U. S. circuit court of appeals for the second circuit. Oliver Wendell Holmes, Jr., as ancillary executor of the will of Oliver Wendell Holmes, deceased, complainant and appellant, *vs.* George D. Hurst, defendant and appellee. Assignment of errors. Rowland Cox, sol'r and counsel for compl't and appellant, 229 Broadway, New York, N. Y. United States circuit court of appeals, second circuit. Filed June 8, 1897. William Parkin, clerk.

45 United States Circuit Court of Appeals for the Second Circuit.

OLIVER WENDELL HOLMES, JR., as Ancillary Executor of the Will of Oliver Wendell Holmes, Deceased, Complainant and Appellant,
*vs.*
GEORGE D. HURST, Defendant and Appellee.
} Bond for Damages and Costs.

Know all men by these presents that we, Albert F. Houghton, a householder in the city of New York, residing at No. 105 E. 19th St., in said city of New York, in the county and State of New York, and Geo. A. Plimpton, a freeholder within the city of New York, and residing at 125 E. 35th St., in said city of New York, in the county and State of New York, are held and firmly bound unto the above-named George D. Hurst in the sum of two hundred and fifty dollars, to be paid to the said George D. Hurst; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the third day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas the above-named Oliver Wendell Holmes, Jr., executor, has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by
46 the judges of the United States circuit court of appeals for the second circuit:

Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ALBERT F. HOUGHTON. [SEAL.]
GEO. A. PLIMPTON. [SEAL.]

Sealed and delivered and taken and acknowledged this third day of June, 1897, before me—

[SEAL.]

HERMAN GUSTOW,
*Notary Public, New York County.*

UNITED STATES OF AMERICA,
*Southern District of New York, State of New York,* } ss:
*City and County of New York,*

Albert F. Houghton and Geo. A. Plimpton, each for himself, being duly sworn, deposes and says that he is worht the sum of five hundred dollars over and above all his just debts and liabilities.

ALBERT F. HOUGHTON.
GEO. A. PLIMPTON.

Severally subscribed and sworn to this third day of June, A. D. 1897, before me—

[SEAL.]

HERMAN GUSTOW,
*Notary Public, New York County.*

47 Endorsed: U. S. circuit court of appeals for the second circuit. Oliver Wendell Holmes, Jr., executor, complainant and appellant, *vs.* George D. Hurst, defendant and appellee. Bond for damages and costs on appeal to the Supreme Court of the United States. Rowland Cox, counsel for appellant. Approved June 7, 1897. E. H. Lacombe, U. S. circuit judge. United States circuit court of appeals, second circuit. Filed June 8, 1897. William Parkin, clerk.

48 United States Circuit Court of Appeals for the Second Circuit.

OLIVER WENDELL HOLMES, JR., Ancillary Executor of the Will of Oliver Wendell Holmes, Deceased, Complainant and Appellant,

*vs.*

GEORGE D. HURST, Defendant and Appellee.

The appeal of the above-named complainant and appellant, Oliver Wendell Holmes, Jr., executor, respectfully shows:

The bill of complaint in this cause was filed on the 20th day of November, 1894, to restrain the defendant herein from infringing upon the copyright on the book entitled "The Autocrat of the Breakfast Table," granted to the late Oliver Wendell Holmes, to which bill the said defendant, on the 18th day of April, 1895, filed an answer, and thereafter the complainant filed a general replication.

This cause thereupon came on for final hearing before the United States circuit court for the eastern district of New York upon the pleadings and an agreed statement of facts, and counsel for the respective parties having been duly heard, the court rendered its decision, and a final decree was, on the 10th day of November, 1896, made dismissing the said bill of complaint upon the merits, with costs to the defendant, which decree was filed and entered in this cause in the office of the clerk of said court on the 11th day of November, 1896.

49 On the 12th day of November, 1896, the appeal of the above-named complainant to the United States circuit court of appeals for the second circuit from said final decree of the circuit court of the United States for the eastern district of New York was allowed and a citation issued to the defendant herein.

The said appeal came on for argument before the United States circuit court of appeals for the second circuit, and after hearing counsel for the respective parties the court rendered its decision, and an order and decree affirming the said final decree of the said United States circuit court for the eastern district of New York was, on the 6th day of May, 1897, made by the said United States circuit court of appeals for the second circuit, which was duly entered in this cause in the office of the clerk of said court.

Wherefore the above-named complainant and appellant, conceiving himself aggrieved by the decision, order, and decree of the United States circuit court of appeals for the second circuit, dated

the 6th day of May, 1897, made in the above-entitled cause, does hereby appeal therefrom to the Supreme Court of the United States, and he prays that his appeal may be allowed and a citation granted, directed to the above-named defendant and appellee, commanding him to appear before the Supreme Court of the United States to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings, and evidence in said cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated New York city, N. Y., June 7th, 1897.

ROWLAND COX,
*Solicitor and Counsel for Complainant and Appellant.*

50 The complainant and appellant having filed the necessary security for costs, it is—

Ordered that the foregoing appeal be, and the same is hereby, allowed.

Dated New York city, N. Y., June 7th, 1897.

(Signed) E. H. LACOMBE,
*U. S. Circuit Judge.*

Service of a copy of the foregoing petition for appeal and allowance of same admitted June 8th, 1897.

ANDREW GILHOOLY,
*Solicitor and Counsel for Defendant and Appellee.*

Endorsed: U. S. circuit court of appeals for the second circuit. Oliver Wendell Holmes, Jr., as ancillary executor of the will of Oliver Wendell Holmes, deceased, complainant and appellant, *vs.* George D. Hurst, defendant and appellee. Petition for appeal. Rowland Cox, sol'r and counsel for compl't and appellant, 229 Broadway, New York, N. Y. United States circuit court of appeals, second circuit. Filed June 8th, 1897. William Parkin, clerk.

51 UNITED STATES OF AMERICA, } *ss:*
*Southern District of New York, Second Circuit,* }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 52, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Oliver Wendell Holmes, Jr., as ancillary executor of the estate of Oliver Wendell Holmes, deceased, complainant and appellant, against George D. Hurst, defendant and appellee, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the city of New York, in the second circuit, this 11th day of June, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the said United States the one hundred and twenty-first.

Seal United States Circuit Court of Appeals, Second Circuit.

WM. PARKIN, *Clerk.*

52 By the Honorable E. Henry Lacombe, one of the judges of United States circuit court of appeals for the second circuit, to George D. Hurst:

Whereas Oliver Wendell Holmes, Jr., as ancillary executor of the will of Oliver Wendell Holmes, deceased, has lately appealed to the Supreme Court of the United States from a decision, order, and decree lately rendered in the United States circuit court of appeals for the second circuit, made in favor of you, the said George D. Hurst, and has filed the security required by law, you are therefore cited to appear before the said Supreme Court of the United States, at the city of Washington, in the District of Columbia, on the 6th day of July, 1897, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, on the 7th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

E. H. LACOMBE,
*U. S. Circuit Judge.*

Service of a copy of the foregoing citation admitted June 9, 1897.

ANDREW GILHOOLY,
*Solicitor and Counsel for Defendant and Appellee.*

53 [Endorsed:] 766. U. S. circuit court of appeals for the second circuit. Oliver Wendell Holmes, Jr., as ancillary executor of the will of Oliver Wendell Holmes, deceased, complainant and appellant, *vs.* George D. Hurst, defendant and appellee. Citation. Rowland Cox, sol'r and counsel for compl't and appellant, 229 Broadway, New York, N. Y. United States circuit court of appeals, second circuit. Filed Jun- 8, 1897. William Parkin, clerk.

Endorsed on cover: Case No. 16,611. U. S. C. C. of appeals, 2nd circuit. Term No., 398. Oliver Wendell Holmes, Jr., as ancillary executor of the will of Oliver Wendell Holmes, deceased, appellant, *vs.* George D. Hurst. Filed June 16th, 1897.

# HOLMES *v.* HURST.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 124. Argued March 3, 1899. — Decided April 24, 1899.

The serial publication of a book in a monthly magazine, prior to any steps taken toward securing a copyright, is such a publication of the same within the meaning of the act of February 3, 1831, c. 16, as to vitiate a copyright of the whole book, obtained subsequently, but prior to the publication of the book as an entirety.

Statement of the Case.

THIS was a bill in equity by the executor of the will of the late Dr. Oliver Wendell Holmes, praying for an injunction against the infringement of the copyright of a book originally published by plaintiff's testator under the title of "The Autocrat of the Breakfast Table."

The case was tried upon an agreed statement of facts, the material portions of which are as follows:

Dr. Holmes, the testator, was the author of "The Autocrat of the Breakfast Table," which, during the years 1857 and 1858, was published by Phillips, Sampson & Company of Boston, in twelve successive numbers of the Atlantic Monthly, a periodical magazine published by them, and having a large circulation. Each of these twelve numbers was a bound volume of 128 pages, consisting of a part of "The Autocrat of the Breakfast Table," and of other literary compositions. These twelve parts were published under an agreement between Dr. Holmes and the firm of Phillips, Sampson & Company, whereby the author granted them the privilege of publishing the same, the firm stipulating that they should have no other right in or to said book. No copyright was secured, either by the author or by the firm or by any other person, in any of the twelve numbers so published in the Atlantic Monthly; but on November 2, 1858, after the publication of the last of the twelve numbers, Dr. Holmes deposited a printed copy of the title of the book in the clerk's office of the District Court of the District of Massachusetts, wherein the author resided, which copy the clerk recorded. The book was published by Phillips, Sampson & Company in a separate volume on November 22, 1858, and upon the same day a copy of the same was delivered to the clerk of the District Court. The usual notice, namely, "Entered according to act of Congress, 1858, by Oliver Wendell Holmes, in the Clerk's Office of the District Court of the District of Massachusetts," was printed in every copy of every edition of the work subsequently published, with a slight variation in the edition published in June, 1874.

On July 12, 1886, Dr. Holmes recorded the title a second time; sent a printed copy of the title to the Librarian of Congress, who recorded the same in a book kept for that purpose,

and also caused a copy of this record to be published in the Boston Weekly Advertiser; and in the several copies of every edition subsequently published was the following notice: "Copyright, 1886, by Oliver Wendell Holmes."

Since November 1, 1894, defendant has sold and disposed of a limited number of copies of the book entitled "The Autocrat of the Breakfast Table," all of which were copied by the defendant from the twelve numbers of the Atlantic Monthly exactly as they were originally published, and upon each copy so sold or disposed of a notice appeared that the same was taken from the said twelve numbers of the Atlantic Monthly.

The case was heard upon the pleadings and this agreed statement of facts, by the Circuit Court for the Eastern District of New York, and the bill dismissed. 76 Fed. Rep. 757. From this decree an appeal was taken to the Circuit Court of Appeals for the Second Circuit, by which the decree of the Circuit Court was affirmed. 51 U. S. App. 271. Whereupon plaintiff took an appeal to this court.

*Mr. Rowland Cox* for appellant.

*Mr. Andrew Gilhooly* for appellee.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

This case raises the question whether the serial publication of a book in a monthly magazine, prior to any steps taken toward securing a copyright, is such a publication of the same within the meaning of the act of February 3, 1831, c. 16, 4 Stat. 436, as to vitiate a copyright of the whole book, obtained subsequently but prior to the publication of the book as an entirety.

The right of an author, irrespective of statute, to his own productions and to a control of their publication, seems to have been recognized by the common law, but to have been so ill defined that from an early period legislation was adopted to regulate and limit such right. The earliest recognition of

this common law right is to be found in the charter of the Stationers' Company, and certain decrees of the Star Chamber promulgated in 1556, 1585, 1623 and 1637, providing for licensing and regulating the manner of printing, and the number of presses throughout the Kingdom, and prohibiting the publication of unlicensed books. Indeed, the Star Chamber seems to have exercised the power of search, confiscation and imprisonment without interruption from Parliament, up to its abolition in 1641. From this time the law seems to have been in an unsettled state — although Parliament made some efforts to restrain the licentiousness of the press — until the eighth year of Queen Anne, when the first copyright act was passed, giving authors a monopoly in the publication of their works for a period of from fourteen to twenty-eight years. Notwithstanding this act, however, the chancery courts continued to hold that, by the common law and independently of legislation, there was a property of unlimited duration in printed books. This principle was affirmed so late as 1769 by the Court of King's Bench in the very carefully considered case of *Millar* v. *Taylor*, 4 Burrows, 2303, in which the right of the author of "Thompson's Seasons," to a monopoly of this work, was asserted and sustained. But a few years thereafter the House of Lords, upon an equal division of the judges, declared that the common law right had been taken away by the statute of Anne, and that authors were limited in their monopoly by that act. *Donaldsons* v. *Becket*, 4 Burrows, 2408. This remains the law of England to the present day. An act similar in its provisions to the statute of Anne was enacted by Congress in 1790, and the construction put upon the latter in *Donaldsons* v. *Becket*, was followed by this court in *Wheaton* v. *Peters*, 8 Pet. 591. While the propriety of these decisions has been the subject of a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright act — in other words, that while a right did exist by common law, it has been superseded by statute.

The right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight; nor is it the right to ideas alone, since in the absence of means of communicating them they are of value to no one but the author. But the right is to that arrangement of words which the author has selected to express his ideas. Or, as Lord Mansfield describes it, "an incorporeal right to print a set of intellectual ideas, or modes of thinking, communicated in a set of words or sentences, and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever." 4 Burrows, 2396. The nature of this property is perhaps best defined by Mr. Justice Erle in *Jefferys* v. *Boosey*, 4 H. L. C. 815, 867: "The subject of property is the order of words in the author's composition; not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation."

The right of an author to control the publication of his works, at the time the title to the "Autocrat" was deposited, was governed by the act of February 3, 1831, c. 16, 4 Stat. 436, wherein it is enacted:

"SEC. 1. That from and after the passing of this act, any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of a book or books, map, chart or musical composition, which may be now made or composed, and not printed and published, or shall hereafter be made or composed, . . . shall have the sole right and liberty of printing, reprinting, publishing and vending such book or books, . . . in whole or in part, for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed."

"SEC. 4. That no person shall be entitled to the benefit of this act, unless he shall, *before publication*, deposit a printed copy of the title of such book or books . . . in the clerk's office of the District Court of the District wherein the author

or proprietor shall reside, etc. And the author and proprietor of any such book . . . shall, within three months from the publication of said book, . . . deliver or cause to be delivered a copy of the same to the clerk of said District."

The substance of these enactments is that, by section one, the author is only entitled to a copyright of books not printed and published; and by section four, that, as a preliminary to the recording of a copyright, he must, before publication, deposit a printed copy of the title of such book, etc.

The argument of the plaintiff in this connection is, that the publication of the different chapters of the book in the Atlantic Monthly was not a publication of the copyright book which was the subject of the statutory privilege; that if Dr. Holmes had copyrighted and published the twelve parts, one after the other, as they were published in the magazine, or separately, there would still have remained to him an inchoate right, having relation to the book as a whole; that his copyright did not cover and include the publication of the twelve parts printed as they were printed in the Atlantic Monthly, and that while the defendant had a right to make copies of those parts and to sell them separately or collectively, he had no right to combine them into a single volume, since that is the real subject of the copyright. Counsel further insisted that, if the author had deposited the twelve parts of the book, one after the other, as they were composed, he would not have acquired the statutory privilege to which he seeks to give effect; that to secure such copyright it was essential to do three things: (1) Deposit the title "The Autocrat of the Breakfast Table;" (2) deposit a copy of the book "The Autocrat of the Breakfast Table;" and (3) comply with the provisions concerning notice; that he could acquire the privilege of copyright only by depositing a copy of the very book for which he was seeking protection; that if the taking of a copyright for each chapter created a privilege which was less than the privilege which would have been acquired by withholding the manuscript until the book was completed, and then taking the copyright, this copyright is valid. His position briefly is that no one of the twelve copyrights, if each chapter were copyrighted, nor

all of them combined, could be held to be a copyright, in the sense of the statute, of the book, which is the subject of the copyright in question; and that neither separately nor collectively could they constitute the particular privilege, which is the subject of the copyright of "The Autocrat of the Breakfast Table," as a whole.

We find it unnecessary to determine whether the requirement of section four could have been met by a deposit of the book, "The Autocrat of the Breakfast Table," prior to the publication of the first part in the Atlantic Monthly, or whether, for the complete protection of the author, it would be necessary that each part should be separately copyrighted. This would depend largely upon the question whether the three months from the publication, within which the author must deposit a copy of the book with the clerk, would run from the publication of the first or the last number in the Atlantic Monthly.

That there was a publication of the contents of the book in question, and of the entire contents, is beyond dispute. It follows from this that defendant might have republished in another magazine these same numbers as they originally appeared in the Atlantic Monthly. He might also, before the copyright was obtained, have published them together, paged them continuously, and bound them in a volume. Indeed, the learned counsel for the plaintiff admits that the defendant had the right to make copies of these several parts, and to sell them separately or collectively; but insists that he had no right to combine them in a single volume. The distinction between publishing these parts collectively and publishing them in a single volume appears to be somewhat shadowy; but assuming that he had no such right, it must be because the copyright protected the author, not against the republishing of his intellectual productions or "the order of his words," but against the assembling of such productions in a single volume. The argument leads to the conclusion that the whole is greater than the sum of all the parts — a principle inadmissible in logic as well as in mathematics. If the several parts had been once dedicated to the public, and the monopoly of the

author thus abandoned, we do not see how it could be reclaimed by collecting such parts together in the form of a book, unless we are to assume that the copyright act covers the process of aggregation as well as that of intellectual production. The contrary is the fact.

If the patent law furnishes any analogy in this particular — and we see no reason why it may not — then there is nothing better settled than that a mere aggregation of familiar elements, producing no new result, is not a patentable combination. *Hailes* v. *Van Wormer*, 20 Wall. 353; *Reckendorfer* v. *Faber*, 92 U. S. 347; *Pickering* v. *McCullough*, 104 U. S. 310; *Richards* v. *Chase Elevator Co.*, 158 U. S. 299. But if there were anything more than mechanical skill involved in the collocation of the several parts of this work, it would be the exercise of inventive genius and the subject of a patent rather than a copyright. If an author permit his intellectual production to be published either serially or collectively, his right to a copyright is lost as effectually as the right of an inventor to a patent upon an invention which he deliberately abandons to the public — and this, too, irrespective of his actual intention not to make such abandonment. It is the intellectual production of the author which the copyright protects and not the particular form which such production ultimately takes, and the word "book" as used in the statute is not to be understood in its technical sense of a bound volume, but any species of publication which the author selects to embody his literary product. We are quite unable to appreciate the distinction between the publication of a book and the publication of the contents of such book, whether such contents be published piecemeal or *en bloc*.

If, as contended by the plaintiff, the publication of a book be a wholly different affair from the publication of the several chapters serially, then such publication of the parts might be permitted to go on indefinitely before a copyright for the book is applied for, and such copyright used to enjoin a sale of books which was perfectly lawful when the books were published. There is no fixed time within which an author must apply for a copyright, so that it be "before publica-

tion;" and if the publication of the parts serially be not a publication of the book, a copyright might be obtained after the several parts, whether published separately or collectively, had been in general circulation for years. Surely, this cannot be within the spirit of the act. Under the English copyright act of 1845, provision is made for the publication of works in a series of books or parts, but it has always been held that each part of a periodical is a book within the meaning of the act. *Henderson* v. *Maxwell*, L. R. 4 Ch. Div. 163; *Bradbury* v. *Sharp*, W. N. (1891) 143.

We have not overlooked the inconvenience which our conclusions will cause, if, in order to protect their articles from piracy, authors are compelled to copyright each chapter or instalment as it may appear in a periodical; nor the danger and annoyance it may occasion to the Librarian of Congress, with whom copyrighted articles are deposited, if he is compelled to receive such articles as they are published in newspapers and magazines; but these are evils which can be easily remedied by an amendment of the law.

The infringement in this case consisted in selling copies of the several parts of "The Autocrat of the Breakfast Table" as they were published in the Atlantic Monthly, and each copy so sold was continuously paged so as to form a single volume. Upon its title page appeared a notice that it was taken from the Atlantic Monthly. There can be no doubt that the defendant had the right to publish the numbers separately as they originally appeared in the Atlantic Monthly, (since those numbers were never copyrighted,) even if they were paged continuously. When reduced to its last analysis, then, the infringement consists in binding them together in a single volume. For the reasons above stated, this act is not the legitimate subject of a copyright.

The decree of the court below must therefore be

*Affirmed.*